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The Default Clause in the Installment Land Contract

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THE DEFAULT CLAUSE IN THE INSTALLMENT LAND CONTRACT

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I. INTRODUCTION

The popularity of the installment land contract, or contract for deed, as a security device for the sale of real property, continues undiminished in Montana.¹ In a time marked by sharp increases in the cost of institutional credit, the seller-financed con-

1. These contracts have been considered previously in Note, *Toward Abolishing Installment Land Sale Contracts*, 36 MONT. L. REV. 110 (1975) [hereinafter cited as *Abolishing Contracts*]; Note, *Forfeiture of Payments Under a Land Purchase Contract in Montana*, 19 MONT. L. REV. 50 (1957) [hereinafter cited as *Forfeiture in Montana*].

tract provides the buyer with an affordable alternative to the standard mortgage.² Compared with other seller-financed arrangements like the purchase money mortgage and trust indenture, the contract provides the seller with a wider and more expeditious range of remedies upon the buyer's default.

Chief among these remedies is forfeiture, which allows the seller to cancel the contract and repossess the property, while retaining payments and improvements already made. For the buyer with little equity in the property, the risk of forfeiture is reasonable. By the terms of the agreement, he may have made only a small down payment on the purchase price at a favorable interest rate. Therefore, he stands to lose little if he defaults and the seller elects forfeiture. But, for that same buyer years later under the contract, the risk has assumed alarming proportions. At this point, his investment in the property may have become substantial, and his obligation may be nearly discharged in full. In this situation, he stands to lose his entire investment, and the sum of his payments which the seller may retain will most certainly exceed the damage that the default has caused. The seller, in fact, may be unjustly enriched by virtue of the forfeiture.

A default clause in an installment land contract rarely contains a provision that safeguards the buyer's equity as it becomes substantial. The forfeiture provision operates in the same manner throughout the life of the contract, even though the interests of the two parties in the property change markedly. In this way, the standard default clause is one-sided, operating exclusively for the benefit of the seller while ignoring the ever-increasing interest of the buyer.

The task of this comment is to examine the default clause and to restructure its remedies to reflect the true condition of these interests as they change during the life of the contract. The goal of this restructuring is to strike a balance of remedial protections, to rectify the situation as it now stands without unduly sacrificing the seller's position. The suggested solution, in this regard, is to relegate forfeiture to an effective role as a remedy for default when that default occurs prior to the buyer's accrual of a reasonably defensible equity.

2. Nationally, the use of these contracts is prevalent among farmers, ranchers and low income home buyers. Lacy, *Land Sale Contracts in Bankruptcy*, 21 UCLA L. REV. 477, 477-78 (1973). See also Mixon, *Installment Land Contracts: A Study of Low Income Transactions, With Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 Hous. L. REV. 523, 523-26 (1970); Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts*, 47 S. CAL. L. REV. 191, 191-98 (1973) [hereinafter cited as *Vendor's Remedies*].

II. THE INSTALLMENT LAND CONTRACT—AN OVERVIEW

A. Nature

The installment land contract has been aptly described as "a hybrid of property concepts on the one hand and contract law on the other."³ The basic aspects of the device are well summarized in a recent Idaho case:

While the transaction involves the transfer of ownership of real property, it is governed by the terms of a contract in which vendor and purchaser join. The vendor generally, but not invariably, deposits a deed in escrow, but title does not pass to the purchaser until all installments are paid in accordance with the contract. The contract is frequently called a "poor man's mortgage" because the vendor, as with a mortgage, finances the purchaser's acquisition of the property by accepting installment payments on the purchase price over a period of years, but the purchaser does not receive the benefit of those remedial statutes protecting the rights of mortgagors The land secures the purchaser's performance because in the event of his default, the vendor ordinarily retains the right to terminate the transaction and retake the property. The advantage to the purchaser is that he does not have to procure the expensive (and sometimes unavailable) institutional financing; the advantage to the vendor is the theoretically simple procedure of terminating the purchaser's interest in the event of default as contrasted with the expensive and time consuming mortgage foreclosure action, with its right to redemption.⁴

B. Remedies—A Comparison

Remedies for a buyer's breach of an installment land contract are not subject to any specific statutory scheme like that provided for the mortgage or trust indenture. As noted above, the buyer under an installment land contract lacks the statutory protection accorded the mortgagor—particularly, a right to a redemption of his interest.⁵ A brief treatment of the remedies allowed under the mortgage and trust indenture is necessary to understand the nature and extent of the remedies allowed under the installment land contract.

3. *Ellis v. Butterfield*, 98 Idaho 644, 646, 570 P.2d 1334, 1336 (1977) (dictum).

4. *Id.* (citations omitted).

5. While an equitable conversion is said to occur in both the installment land contract and the mortgage, the practical distinction between the position of the mortgagee and that of the purchaser is very different. See generally Lee, *The Interests Created by the Installment Land Contract*, 19 U. MIAMI L. REV. 367, 370-77 (1965) [hereinafter cited as *Interests*].

1. *Mortgage and Trust Indenture*

a. *Mortgage*

Under a mortgage without a power of sale, the mortgagee's sole remedy for the mortgagor's breach is to sue to foreclose his equity of redemption.⁶ The foreclosure proceeding is set by statute, which empowers the court to decree a sale of the property or a portion of it, and to apply the proceeds to pay the costs of the court, the expenses of the sale and the amount due the plaintiff.⁷ If a surplus exists from the sale, the court may order it paid to whomever is entitled to it.⁸

If the proceeds from the sale are insufficient to satisfy the mortgagor's obligations, a deficiency judgment may be granted making him personally liable.⁹ A deficiency judgment, however, is barred in purchase money mortgages.¹⁰

If the mortgage contains a power of sale provision, a non-judicial sale of the property may take place in accordance with the terms of that provision.¹¹ Notice of the sale, however, must be served personally on the mortgagor and other persons claiming interests of record 30 days before the sale date.¹² An action may also be maintained for a judicial foreclosure.¹³

Under the mortgage, with or without the power of sale, the mortgagor is entitled to remedy his breach until foreclosure is judicially decreed, or the non-judicial sale takes place.¹⁴ If such a redemption occurs, the mortgage continues in effect.¹⁵ The mortgagor, of course, may bid at the sale as well to recover the property. After the sale, the mortgagor is guaranteed a statutory right of redemption for one year.¹⁶ He may also continue to live on the property for that time, if he can show that it was used as a home for himself or his family.¹⁷ The purchaser from the sale is entitled to the conveyance only upon expiration of the redemption period.¹⁸

6. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 71-1-222(1) (1979).

7. MCA § 71-1-222 (1979).

8. MCA § 71-1-225 (1979).

9. MCA § 71-1-222(2) (1979).

10. MCA § 71-1-232 (1979).

11. MCA § 71-1-223 (1979).

12. MCA § 71-1-224 (1979).

13. MCA § 71-1-223 (1979).

14. G. OSBORNE, G. NELSON, D. WHITMAN, *REAL ESTATE FINANCE LAW* 425 (1st ed. 1979) [hereinafter cited as *REAL ESTATE FINANCE*].

15. *Id.*

16. MCA §§ 71-1-228 and 25-13-802 (1979).

17. MCA § 25-13-821 (1979).

18. MCA § 25-13-810 (1979).

b. *Trust Indenture*

This discussion will focus exclusively on the form of the trust indenture which is authorized in Montana as a security device for the sale of land 15 acres or less in size.¹⁹ Under this form, a power of sale is conferred by statute upon a trustee,²⁰ who may foreclose the trust indenture once several conditions are met: The trust indenture has been recorded, a default has been found to exist and notice requirements for the sale have been satisfied.²¹ The buyer, denominated as "grantor,"²² may cure his default until the date of the sale and thereby keep the trust indenture in effect.²³ Notice of the sale must be given to him 120 days before it is to take place,²⁴ which guarantees him ample time to secure refinancing if it is available. Unlike the mortgage, there is no statutory right of redemption after the sale.²⁵

The trustee is authorized to use the sale proceeds to pay the cost of the sale, attorney and trustee fees and the grantor's obligation.²⁶ If a surplus exists, the trustee may pay it to whomever is entitled.²⁷ Like the purchase money mortgage, no deficiency judgment is allowed under the trust indenture.²⁸

2. *Installment Land Contract*

The vendor's most commonly exercised remedy for breach of an installment land contract is to declare a forfeiture.²⁹ That remedy, among others, is set forth in the contract's default clause, and provides that, upon the purchaser's failure to perform, the vendor may elect to declare that breach a default and then cancel the contract.³⁰ The effect of such a cancellation is to allow the vendor to abandon his obligation under the contract, to retain all payments

19. MCA § 71-1-304 (1979). See generally *Abolishing Contracts*, *supra* note 1, at 116-18. MCA § 71-1-321 (1979) recognizes the use of trust deeds as valid mortgage forms as well.

20. MCA § 71-1-304(2) (1979). The trustee holds legal title for the purposes of the trust indenture. MCA § 71-1-303(5) (1979).

21. MCA § 71-1-313 (1979).

22. MCA § 71-1-303(3) (1979). The seller may be named the beneficiary of the trust indenture. MCA § 71-1-303(1) (1979).

23. MCA § 71-1-312 (1979).

24. MCA § 71-1-315 (1979).

25. MCA § 71-1-318(3) (1979).

26. MCA § 71-1-316(1) (1979).

27. MCA § 71-1-316(3) (1979).

28. MCA § 71-1-317 (1979).

29. The object of this section is to provide an overview of the vendor's remedies for a purchaser's default under an installment land contract. A more detailed approach to the major remedies follows in the next section on the default clause.

30. See text accompanying note 44 *infra*.

and improvements made by the purchaser and to repossess the property.³¹ Since the deed to the property is usually kept in escrow for the life of the contract, cancellation also serves to have the deed returned to the vendor. The buyer is usually allowed a period in which to cure his default, prior to a declaration of forfeiture, and thereby keep the contract in effect. If an acceleration provision is present in the default clause, the seller may demand payment of the entire balance of the debt, once the buyer has failed to cure the particular default.³² When the debt is accelerated, the buyer receives another period of time, often 30 days, in which to refinance and discharge his entire obligation to the seller. Subsequent to cancellation, no right to redemption exists, nor is the seller bound to reimburse the buyer for any portion of his payments that might exceed the damage sustained by the default.

Without resorting to the remedy of forfeiture, the vendor may sue on the default. His damages are computed as the full contract price minus the market value of the land at the date of the default and any payment received.³³ The vendor may also sue for each installment as it becomes due although it is seldom done.³⁴ If an acceleration provision is present in the clause, the vendor may demand the balance owed and sue for that amount.³⁵

If the purchaser is in possession of the property and defaults, the vendor may also bring an action in ejectment³⁶ or unlawful detainer.³⁷ If the purchaser is not in possession, the vendor may quiet title.³⁸ Again, in either action, the vendor is not obligated, unless the terms of the clause provide otherwise, to grant the purchaser either an opportunity to redeem or restitution of payments in ex-

31. See text accompanying notes 47-52 *infra*.

32. See text accompanying notes 100-12 *infra*.

33. 5 A. CORBIN, CONTRACTS § 1098A (1964) (costs of making a resale may be allowed as well). There is a split of authority on whether an action at law may result in the vendor being awarded the purchase price as damages. Generally, specific performance is considered the proper suit for recovery of the purchase price. Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 551 (1965) [hereinafter cited as *Remedies for Breach*]. See text accompanying note 116 *infra*.

34. *Interests*, *supra* note 5, at 374. That course of action is seldom pursued simply because of the time and expense involved, and so an acceleration provision is usually employed to call the balance due. See text accompanying notes 100-12 *infra*.

35. *Id.* Also, it should be noted that the two acts of tendering the deed and paying the final installment are considered concurrent obligations. See *Huston v. Vollenweider*, 101 Mont. 156, 161-62, 53 P.2d 112, 114 (1935). See also Spencer, *Remedies Available Under a Land Sale Contract*, 3 WILLAMETTE L.J. 164, 180-81 (1965) [hereinafter cited as Spencer].

36. *Ellis v. Butterfield*, 98 Idaho 644, 651, 570 P.2d 1334, 1341 (1977) (Bistline, J., dissenting); *Interests*, *supra* note 5, at 374.

37. *Kootenai Corp. v. Dayton*, ___ Mont. ___, 601 P.2d 47, 49-50 (1979).

38. *Interests*, *supra* note 5, at 374.

cess of damage.³⁹

The vendor may sue for specific performance of the contract, and the procedure is much like a judicial foreclosure.⁴⁰ The court may provide the purchaser in default with an opportunity to redeem his interest and, if he fails to do so within the time provided, the property may be sold and the proceeds applied to the debt plus damages and expenses. Unlike the purchase money mortgage and trust indenture, a deficiency judgment is not barred if the sale proceeds are insufficient to satisfy the purchaser's obligation.⁴¹

In sum, the vendor's remedies under the installment land contract are far more numerous and varied than those of the mortgagee and the beneficiary. There exists a corresponding lack of statutory protection for the purchaser: He is without the right of redemption and possession to which the mortgagor is entitled; he lacks the bar against the deficiency judgment available under the purchase money mortgage and trust indenture; and he is without a right of restitution of his payments should those payments be found to exceed the damage sustained by the default.

This lack of protection explains why, under most installment land contracts, the vendor can afford to offer a low down payment and a favorable interest rate: to foreclose is far more costly and time consuming than to declare forfeiture. While power of sale in a mortgage reduces the cost and delay considerably since the proceeding is extrajudicial, the power of sale is still subject to the right of redemption and possession, which may adversely affect the bids at the sale.⁴² For the most part, the trust indenture compares favorably with the installment land contract. The major distinction between the two is that forfeiture may be effected in even less time than the 120 days set for foreclosure under the trust indenture. Also, an installment land contract may transfer real property of any size while the trust indenture is limited to tracts of 15 acres or less.

III. THE DEFAULT CLAUSE

The relationship of the vendor to the purchaser under an installment land contract is analogous to that of the mortgagee to the mortgagor under a purchase money mortgage: under both ar-

39. *Id.*

40. See text accompanying notes 113-21 *infra*.

41. See text accompanying notes 124-26 *infra*.

42. The purchaser from the sale will not be entitled to a conveyance, until one year has elapsed from the date of the sale, as in a court-ordered sale. See MCA § 25-13-810 (1979).

rangements, the seller finances the purchase. But since the installment land contract is not subject to the rigid statutory framework of the mortgage, the vendor, unlike the mortgagee, is free to exercise his bargaining leverage to script a set of remedies that inhere exclusively to his benefit. For example, in most default clauses, no mention is made of the purchaser's remedies for the vendor's breach; that contingency is left to basic principles of contract law. More importantly, the standard default clause omits any sort of protection for the buyer that would operate once his equity becomes substantial. This need for protection of the buyer's equity arises primarily in the context of forfeiture, but the absence of that protection affects the vendor's exercise of his remedies as well. In the course of the following sections, the advantages to the vendor of including a provision protecting the purchaser's equity are developed, and some suggestions for such a provision are made.

A. Forfeiture

When a buyer defaults on his payments under an installment land contract, the usual response of the seller is to terminate the contract pursuant to the forfeiture provision in the default clause.⁴³ That provision invariably contains words to the effect: Time is of the essence and, if the buyer fails to perform promptly and fully, the seller may cancel the contract upon reasonable notice and repossess the property, while retaining payments and improvements already made.⁴⁴ Thus, if the buyer cooperates by leaving quietly and quickly, the provision provides an expeditious remedy that allows the seller to dispose of the property to another buyer without the 120-day delay of the trust indenture, or the year-long right of redemption and possession of the mortgage. The fact that many purchasers in default do walk away from the contract contributes to the continued use of forfeiture.⁴⁵ If the purchaser defends against the exercise of forfeiture, the vendor must resort to the courts and the advantage of expediency is lost.⁴⁶

43. See Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 3 BYU L. REV. 541, 542 (1977) [hereinafter cited as Nelson].

44. *Id.* See also *Vendor's Remedies*, *supra* note 2, at 193 n.7.

45. *Vendor's Remedies*, *supra* note 2, at 205-06; Nelson, *supra* note 43, at 570. "The thing to remember, however, is that any device is practical if the other party does nothing to protect his rights." Nelson, *The Use of Installment Land Contracts in Missouri—Counting Clouds on Titles*, 33 J.Mo.B. 161, 165 (1977), quoted in Nelson, *supra* note 43, at 570.

46. See also Nelson, *supra* note 43, at 570.

1. *The American Rule*

The effect of the vendor's termination of the contract is expressed in what has been labeled the "American Rule:"⁴⁷

[A] vendee in default cannot recover back from his vendor not in default any money paid on the contract even though as a result of the breach the vendor has abandoned all idea of further performance and retains the money not for application on the purchase price but as forfeited.⁴⁸

The rule is based on a desire to honor the intent of the parties:⁴⁹

The law will leave the parties to stand where they have voluntarily placed themselves. If a buyer defaults, therefore, the law will not intervene to prevent the consequences of the breach. It has been said that a buyer cannot both breach his contract and expect a return of his investment.⁵⁰

The traditional practice of upholding forfeiture provisions is simply allowing that which would occur if no express provision were included in the contract.⁵¹ Early Montana cases reflect this common law basis of intent.⁵²

2. *Attacks on the Rule*

Enforcement of forfeiture provisions has received frequent and persuasive criticism, particularly when the buyer has nearly performed his obligations and his investment in the property is substantial.⁵³ Authorities such as Williston, Corbin and McCormick oppose the American Rule.⁵⁴ The authors of *Restatement of Contracts* endorse the minority position, which holds that earnest money may be forfeited but substantial amounts may not.⁵⁵ Corbin poses two questions that operate rhetorically to focus much of the criticism:

47. The term American Rule is employed in Annot., 31 A.L.R.2d 12 (1953) to mark the difference from English and Canadian rules; the term does not have any special significance in itself.

48. Annot., 31 A.L.R.2d 12 (1953).

49. Nelson, *supra* note 43, at 543.

50. Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALBANY L. REV. 71, 76 (1977).

51. Annot., 31 A.L.R.2d 9, 34 (1953).

52. *E.g.*, Edwards v. Muri, 73 Mont. 339, 350, 237 P. 209, 237 (1925); *Forfeiture in Montana*, *supra* note 1, at 53-54.

53. *E.g.*, Freedman v. Rector of St. Mathias Parish, 37 Cal. 2d 16, 230 P.2d 629, 632 (1953) (dictum, Traynor, J.).

54. 5 S. WILLISTON, CONTRACTS § 791 (3d ed. 1961); 5A A. CORBIN, CONTRACTS § 1129 (1964); C. MCCORMICK, DAMAGES § 153 (1935).

55. RESTATEMENT OF CONTRACTS § 357 (1932).

Is a plaintiff who has partly performed a contract to be penalized more strongly than one who has not performed at all? Secondly, is a plaintiff who has almost fully performed his contract to be penalized more heavily than one who has performed only a small part of the contract?⁵⁶

When the forfeiture provision states that payments shall be retained as liquidated damages for the buyer's default, enforcement of the provision has been criticized as giving effect to a penalty or forfeiture in contravention of public policy:⁵⁷

That such contracts do, in fact, provide for a penalty in place of just compensation cannot be doubted. In most such instances the breach consists of the mere non-payment of money at the time specified; and the amount of the forfeiture increases as performance proceeds, so that the penalty grows larger as the breach grows smaller.⁵⁸

3. *Measures to Mitigate*

a. *Legislation*

To lessen the impact of forfeiture, some states have enacted statutes regulating the circumstances in which forfeiture is permitted.⁵⁹ Iowa, for example, provides a mandatory procedure for termination of the installment land contract, which includes notice requirements and a 30-day grace period in which to cure the default.⁶⁰ Upon the buyer's failure to cure, the seller may record the notice and proof of its service, which then establishes constructive notice of the termination and forfeiture.⁶¹ Minnesota, North Dakota and South Dakota have similar statutes with grace periods of different lengths of time.⁶² Arizona provides a grace period graduated in time according to the amount of payment made on the purchase price.⁶³

Maryland has outlawed forfeiture in contracts for residential property purchased by noncorporate buyers; those debts must be

56. Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013, 1014 (1931) [hereinafter cited as Corbin].

57. See *Freedman v. Rector of St. Mathias Parish*, 37 Cal. 2d 16, 230 P.2d 629, 632 (1953).

58. Corbin, *supra* note 56, at 1029. See also *id.* at 1028-31 (forfeiture provision distinguished from a bona fide liquidated damages provision).

59. See Nelson, *supra* note 43, at 544-47.

60. IOWA CODE ANN. §§ 656.1 to .6 (West 1950).

61. *Id.*

62. See MINN. STAT. ANN. § 559.21 (West Supp. 1977); N.D. CENT. CODE §§ 32-18-01 to -06 (1976); S.D. COMP. LAWS ANN. §§ 21-50-01 to -06 (1967).

63. ARIZ. REV. STAT. § 33-741 (1974).

satisfied instead by mortgage foreclosure methods.⁶⁴ Oklahoma has gone further and outlawed the device entirely. All installment land contracts in that state are governed by mortgage law.⁶⁵

b. *Judicial Safeguards*

Cognizant of the potential inequity implicit in the American Rule, and confronted with specific situations in which forfeiture appears unreasonably harsh, courts have resorted to three methods to avoid enforcement of the forfeiture provision. The methods are: Finding an equity of redemption, either outright or by means of the vendor's prior waiver of delinquency; granting restitution to the purchaser in default; and providing judicial foreclosure of the purchaser's equity.⁶⁶

i. *Redemption by waiver*

Prior waiver by the vendor of late payments has been found to excuse an overdue payment upon which the vendor seeks to enforce forfeiture,⁶⁷ and the court may grant the purchaser in default an opportunity to redeem and complete the contract.⁶⁸ But, if the vendor has issued a notice that no further delays shall be tolerated and that the purchaser is considered in default, the delay usually will not be excused.⁶⁹

ii. *Redemption outright*

Without relying on waiver, some courts grant the purchaser in default an equity of redemption unconditionally, while other courts may grant it only if the purchaser has a substantial investment in the property.⁷⁰ California's movement toward unconditional redemption seen in the cases below is noteworthy, because

64. MD. REAL PROP. CODE ANN. §§ 10-101 to -108 (1974).

65. OKLA. STAT. ANN. tit. 16 § 11A (West Supp. 1976).

66. See Nelson, *supra* note 43, at 547-66 (judicial intervention nationally); *Vendor's Remedies*, *supra* note 2, 199-205 (judicial intervention in California).

67. E.g., *Yellowstone County v. Wight*, 115 Mont. 411, 417, 145 P.2d 516, 518 (1943) (implied waiver of vendor's right of forfeiture sufficient to grant relief under ant forfeiture statute). See also Nelson, *supra* note 43, at 548-49 (discussion of Missouri and Utah courts' affinity for this form of equity).

68. *Suburban Homes Co. v. North*, 50 Mont. 108, 117, 145 P. 2, 5 (1914) (dictum).

69. *Williams Double Diamond, Inc. v. Royal Village, Inc.*, ___ Mont. ___, 607 P.2d 1120, 1123 (1980); *Huffine v. Lincoln*, 87 Mont. 267, 279, 287 P. 629, 631 (1930); *Suburban Homes Co. v. North*, 50 Mont. 108, 117, 145 P. 2, 5 (1914).

70. Nelson, *supra* note 43, at 550. An equity of redemption means "the right of a debtor who has defaulted on his loan obligations to avoid the adverse consequences of a default by making payments owing to the lender." *Vendor's Remedies*, *supra* note 2, at 199-200.

the statutes that have made that development possible have identical counterparts in Montana. In *Barkis v. Scott*,⁷¹ the court held that the default of a buyer, caused by the overdraft on his bank account in paying the installment, along with his subsequent attempt to tender the amount due, did not constitute a "grossly negligent, willful, or fraudulent breach of duty" under California's "antiforefeiture" statute.⁷² Therefore, he was given the opportunity to redeem. In *Petersen v. Ridenour*,⁷³ the court moved past a reliance on the antiforefeiture statute in granting redemption to a buyer in willful default. The statute employed there prohibited "specific [or] preventive relief . . . to enforce a penalty or forfeiture."⁷⁴ In *MacFadden v. Walker*⁷⁵ specific performance was granted to a buyer who was in willful default for over two years and had paid more than half the purchase price. The court relied on four statutes in holding that a forfeiture that bore no reasonable relation to the damage sustained by the breach could not be enforced.⁷⁶

iii. Restitution

Utah, Florida and California have adopted the position contrary to the American Rule.⁷⁷ California's development of a canon of law providing a right of restitution to a purchaser in default warrants a brief examination, since that development also concerns the same statutes involved above.

In *Baffa v. Johnson*,⁷⁸ a buyer in willful default was denied restitution, but only because he failed to prove that his payments exceeded the seller's damage. A year later, the California Supreme Court decided *Freedman v. Rector of St. Mathias*,⁷⁹ which conclu-

71. 34 Cal. 2d 116, 208 P.2d 367 (1949).

72. California's antiforefeiture statute, CAL. CIV. CODE § 3275 (West 1970), and MCA § 28-1-104 (1979) are identical; for the text of MCA § 28-1-104 (1979), see text accompanying note 89 *infra*.

73. 135 Cal. App. 2d 720, 287 P.2d 848 (1955).

74. The relevant portion of that statute, CAL. CIV. CODE § 3369 (West 1970), and MCA § 27-1-401 (1979) are identical.

75. 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971).

76. The four California statutes and their counterparts are: CAL. CIV. CODE § 3294 (West 1970), MCA § 27-1-221 (1979) (limitation on exemplary damages); CAL. CIV. CODE §§ 1670, 1671 (West 1970), MCA § 28-2-721 (1979) (prohibiting liquidated damages with exception); CAL. CIV. CODE § 3369 (West 1970), MCA § 27-1-401 (1979) (limiting specific and preventive relief).

77. See Nelson, *supra* note 43, at 554-59; *Remedies for Breach*, *supra* note 33, at 552-55 (Florida); *Vendor's Remedies*, *supra* note 2, at 201-05 (California).

78. 35 Cal. 2d 36, 216 P.2d 13 (1950).

79. 37 Cal. 2d 16, 230 P.2d 629 (1953) (Traynor, J., Schaur, J., dissenting in part). See note 72 *supra* (California antiforefeiture statute).

sively established a right of restitution for the purchaser in willful default independent of the ant forfeiture statute.⁸⁰ In *Freedman*, the plaintiff paid \$2,000 down on two lots and agreed to pay the balance of \$16,000 within 30 days. Later he repudiated the contract, claiming there was a cloud on the title, and demanded the return of the downpayment. The defendant sold the property and the plaintiff sued for specific performance. While the court affirmed judgment denying the plaintiff specific performance or damages, it reversed on the issue of restitution. The dispositive fact was that the defendant had sold the property for \$2,000 more than the price originally agreed upon with the plaintiff. The court held that "[i]f the defendant is allowed to retain the amount of the down payment in excess of its expenses in connection with the contract it will be enriched and plaintiff will suffer a penalty in excess of any damages he caused."⁸¹ Because the facts showed that the plaintiff was in willful default, the court held that the statutory relief provided by the ant forfeiture statute could not apply. Instead, the court found that the four statutes, later employed in *MacFadden*, "together with the policy of the law against penalties and forfeitures provide an alternative basis for relief independent of [the ant forfeiture statute]."⁸² Again, those statutes have identical counterparts in Montana.⁸³

iv. *Judicial foreclosure*

Only two states—Indiana and California—have shown a tendency to treat installment land contracts as mortgages without express statutes to that effect.⁸⁴ Indiana cases reflect this trend clearly, while only intimations of it exist in California. For example, Justice Traynor, writing the opinion in *Honey v. Henry's Franchise Leasing Corp.*,⁸⁵ included a summary of a proposal for a judicial sale made by amicus curiae. He concluded, however, that the remedy of a judicial sale was inappropriate there because the vendor had not requested a rescission of the contract, and neither

80. See *Vendor's Remedies*, *supra* note 2, at 202 (cases following *Freedman*).

81. *Freedman*, 37 Cal. 2d at ___, 230 P.2d at 631.

82. *Id.* In the opinion, the court considered *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713 (1898), a leading California case which espouses the American Rule, to show the reason why those statutes could be invoked to avoid the effect of that rule. *Id.* Early Montana cases relied on *Glock*. *E.g.*, *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 297, 133 P. 694, 696 (1913).

83. See note 76 *supra*.

84. Nelson, *supra* note 43, at 559-62 (discussion of this trend in Indiana and California).

85. 64 Cal. 2d 801, 415 P.2d 833, 52 Cal. Rptr. 18 (1966).

party had requested such sale.⁸⁶ In a case prior to *Honey*, the Ninth Circuit Court of Appeals affirmed a judgment granting strict foreclosure for a vendor on the basis of California law, but said also that the lower court could have ordered a judicial sale with an equity of redemption.⁸⁷ In reaching that conclusion, the court espoused a broad view of the court's power of equity in the context of the installment land contract:

There is no equitable principle which is more firmly established in American jurisprudence than the premise that where a vendee has paid a considerable portion of the purchase price or if the property has largely enhanced in value by reason of permanent improvements, or otherwise, or if for any other reason it would be inequitable to grant a cancellation of the contract, or refuse a defaulting vendee reasonable opportunity to cure his defaults, *it is within the inherent power of a court of chancery, independent of statute*, to decree that the property be sold by judicial sale with the view that the purchase price, expense of litigation and sale shall first be paid, with the balance over, if any, to the vendee, thus preserving, so far as is practicable, the respective equities of the vendor and the vendee.⁸⁸

v. *Judicial Relief in Montana*

Montana Code Annotated [hereinafter cited as MCA] § 28-1-104 (1979), which is identical to California's ant forfeiture statute, provides:

Whenever by the terms of an obligation a party thereto incurs a forfeiture or a loss in the nature of a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

Since 1913 this statute has provided the chief avenue for equitable relief from forfeiture under an installment land contract.⁸⁹ Relief is discretionary and must be requested. Both redemption and restitution have been granted, if the purchaser has been able to prove three elements:

86. *Id.* at 803, 415 P.2d at 835, 52 Cal. Rptr. at 20.

87. *Ward v. Union Bond & Trust Co.*, 243 F.2d 476, 480-81 (9th Cir. 1957).

88. *Id.* at 480. See generally *Vendor's Remedies*, *supra* note 2, at 204 (discussion of this case which has yet to be dealt with by California courts).

89. *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 302-04, 133 P. 694, 698-99 (1913) (apparently the first installment land contract case in which a purchaser was granted relief under the statute); *Sharp v. Holthusen*, ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. 1651, 1655 (1980) (most recent application).

- (1) that he stands to incur a forfeiture;
- (2) a. (if redemption is requested) that he has tendered full compensation within a reasonable time;
b. (if restitution is requested) that he has paid more than the reasonable rental for the land;
- (3) that he has reasonable grounds for breaching the contract.⁹⁰

The third element, above, is drawn from *Fratt v. Daniels-Jones*,⁹¹ in which the statute's express standard of a breach not "grossly negligent, willful, or fraudulent" was construed to mean that facts must be shown "which appeal to the conscience of a court of equity."⁹² Facts that have met that test have included: "[B]reach or apparent breach of the agreement by the vendor; reasonable doubts about the vendor's ability to convey good title; and misrepresentation by the vendor."⁹³ Financial inability also appears to qualify as reasonable grounds for breach, particularly when redemption is requested.⁹⁴ Facts that have failed the test have included: Failure by the purchaser to bring an action for misrepresentation for over two years; "forgetting"⁹⁵ to make payments for over four months; and default before an alleged breach by the vendor became known.⁹⁶

MCA § 28-1-104 (1979) illustrates the type of compromise between the policies at conflict in the area of installment land contracts: freedom to contract and aversion to forfeiture and penalty. The compromise favors the policy of freedom to contract—specifically, the freedom to agree to remedies available upon breach—because relief is discretionary with the court, and the burden rests squarely on the applicant to prove the unreasonableness of the imminent forfeiture.

From the sets of facts that have won relief under the ant forfeiture statute, it may be noted that the "willful" defaulter has

90. *Abolishing Contracts*, *supra* note 1, at 114 (footnotes omitted). This article presents detailed treatment of relief provided by this statute in the installment land contract area; therefore the statute will not be treated in detail here. *Id.* at 112-15.

91. 47 Mont. 487, 133 P. 700 (1913).

92. *Id.* at 499, 133 P. at 703 (plaintiff's appeal failed to move the court when he maintained he "forgot" to pay the installments for four months). The test has continued to be used. *E.g.*, *Sharp v. Holthusen*, ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. 1651, 1654 (1980).

93. *Abolishing Contracts*, *supra* note 1, at 114-15 (footnotes and citations omitted).

94. *See Sharp v. Holthusen*, ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. 1651, 1654 (1980) (request for redemption granted when buyer fell behind in payments when forced to repair well); *Parott v. Heller*, 171 Mont. 212, 215, 557 P.2d 819, 820 (1976) (request for redemption granted when crops failed). Both cases reveal applicants made good faith efforts to secure the necessary funds. *Id.* *See generally Abolishing Contracts*, *supra* note 1, at 115.

95. *See* note 92 *supra*.

96. *Abolishing Contracts*, *supra* note 1, at 115.

fared somewhat better in Montana courts than he has under the same statute in California. This discrepancy, however, may explain why development of theories independent of the statute has yet to be undertaken here, while it has with such success in California. Nevertheless, California-style attacks on forfeiture seem inevitable in Montana courts.

In sum, blind reliance on the remedy of forfeiture is not practical. The chief value of the remedy lies in its expediency. If the purchaser is willing to contest the declaration of forfeiture in court, that expediency is lost because the vendor will encounter virtually the same delay that he would experience under an action for judicial foreclosure.⁹⁷ The purchaser with substantial equity in the property is certain to resist forfeiture since he has so much to lose. Moreover, he may very well succeed on the basis of the antiforfeiture statute or some novel defense theory, largely because a court motivated by equitable principles is inclined to regard forfeiture with disfavor.⁹⁸ One commentator has assessed the national situation as follows:

While forfeitures are still occasionally judicially enforced, it nevertheless can be safely stated that in no jurisdiction today will a vendor be able to assume that forfeiture provisions will be automatically enforced as written.⁹⁹

B. Acceleration and Specific Performance

An acceleration provision in the default clause empowers the vendor to demand immediate payment of the balance owed on the purchase price.¹⁰⁰ It is employed in most default situations either prior to declaring forfeiture, or prior to suing for specific performance or for damages.¹⁰¹ When coupled with specific performance,

97. See *Vendor's Remedies*, *supra* note 2, at 206-09 (discussion of the disadvantages involved with enforcing remedies by litigation).

98. Cf. *Glacier Campground v. Wild Rivers, Inc.*, ___ Mont. ___, 597 P.2d 689, 692-93 (1979) (dictum). "Despite the fact that forfeitures are not favored in law or equity, purchasers advance a most curious request, that being, to impose forfeiture on them. While that might be advantageous for those particular defendants, we are not unmindful of the harsh results which forfeiture may work in other circumstances." *Id.* But see *Sharp v. Holthusen*, ___ Mont. ___, ___ P.2d ___, 37 St. Rptr. 1651, 1654 (1980). "There comes a time when failure to perform is not reasonable, and the application of the antiforfeiture statute not applicable, but this is not the case." *Id.*

99. Nelson, *supra* note 43, at 544 (footnotes omitted).

100. See *Rader v. Taylor*, 134 Mont. 419, 431, 333 P.2d 480, 488 (1958) (An alleged acceleration provision was unenforceable since it was not "sufficient authority to declare future installments, not yet due, to be due and payable.").

101. Compare *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 294, 133 P. 694, 695 (1913) (default clause provided for automatic acceleration of the debt upon a breach) with

the remedy may operate as a judicial foreclosure without the prohibition against a deficiency judgment.¹⁰²

1. *Acceleration*

The usual course of events in which acceleration may occur is essentially as follows: When the buyer fails to make an installment payment, the seller notifies him that he is in default and, unless the default is cured within 30 days, the seller will accelerate the debt. If the default remains uncured at the end of that time, the seller notifies the buyer that the debt is deemed accelerated, and that the buyer has 30 additional days in which to make payment on the balance of the purchase price. If the buyer is able to refinance and make the payment within that time, his contract obligation is discharged. If the debt remains unpaid, the buyer may be notified that the seller is thereby canceling the contract pursuant to the forfeiture provision, or that he intends to pursue some other remedy at law or equity to recover the purchase price.¹⁰³

The advantage of acceleration to the vendor is twofold. First, it allows him to sue for the entire purchase price following default, rather than having to wait until after the final installment becomes due—an impractical course of action if the contract is to run for any length of time. Without acceleration, the vendor must be content to sue for whatever payments are presently owed, or sue on each installment as it becomes due.¹⁰⁴ Second, acceleration acts on the purchaser as a substantial prod to keep his payments current.

The leading case in Montana on acceleration provisions is *Rader v. Taylor*,¹⁰⁵ in which the court held that the alleged acceleration provision in the contract was not, in fact, an acceleration provision.¹⁰⁶ As a result, not only was the notice of acceleration held invalid, but the subsequent notice of forfeiture, which was sent upon the buyer's failure to pay off the contract, was also held invalid.¹⁰⁷ In sum, the *Rader* court held, "[i]n the absence of an agreement . . . to that effect the maturity of the debt cannot be

Christensen v. Hunt, 147 Mont. 484, 488-89, 414 P.2d 648, 651 (1966) (acceleration is coupled with seller's option to pursue other remedies).

102. In the sense used above, judicial foreclosure means a court-ordered sale of the property to satisfy the buyer's debts as in a mortgage.

103. See text accompanying notes 167-69 *infra* (example of how a provision may be drafted to operate as above).

104. See text accompanying notes 33-35 *supra*. An action at law for damages is always available for breach.

105. 134 Mont. 419, 333 P.2d 480 (1958).

106. *Id.* at 427, 333 P.2d at 486.

107. *Id.* at 429, 333 P.2d at 487.

accelerated."¹⁰⁸

In finding the alleged acceleration provision invalid, the *Rader* court measured it against three examples of a valid provision:

"then all of said debt secured thereby shall become due and payable"¹⁰⁹

"the total balance due under the contract shall become immediately due and payable"¹¹⁰

"then the whole of said payments and interest shall, at the election of said first party become immediately due and payable."¹¹¹

The alleged acceleration provision in *Rader* was intermingled with the forfeiture provision:

And in case of the failure of Buyers to make either of the payments . . . then the whole of said payments and interest shall, at the election of Sellers[,] be forfeited and determined by giving to Buyers ninety days (90) notice in writing . . .¹¹²

Thus, if an acceleration provision is to be effective, it must be drafted substantially the same as the above examples, so it can be recognized as distinct from any other remedy in the default clause. Maintaining the distinctness of acceleration works to the advantage of the vendor in another way. In order to keep his options open upon default, the vendor should not wed acceleration to any one remedy. He may wish to accelerate the debt, examine the circumstances of the default, and then elect his remedy, whether it be forfeiture, a suit for damages or a suit for specific performance.

2. *Specific Performance*

Because the law considers each parcel of real property unique, the remedy of specific performance is available to either party upon a breach of an installment land contract.¹¹³ In *Glacier Campground v. Wild Rivers, Inc.*,¹¹⁴ the Montana Supreme Court adopted a new wrinkle to that remedy as it operates for the benefit of a vendor upon a purchaser's default.

Essentially, the court in *Glacier* recognized that a request for a money judgment for the balance of the purchase price, which

108. *Id.* at 427, 333 P.2d at 486.

109. *Id.* at 431, 333 P.2d at 488 (citing *Bohan v. Harris*, 71 Mont. 495, 497, 230 P. 586, 587 (1924)).

110. *Id.* (citing *Silvast v. Asplund*, 93 Mont. 584, 594, 20 P.2d 631, 636 (1933)).

111. *Id.* (citing *White v. Jewitt*, 106 Mont. 416, 418, 78 P.2d 85, 86 (1938)).

112. *Id.* at 425, 333 P.2d at 485.

113. *Spencer, supra* note 35, at 172; *Remedies for Breach, supra* note 33, at 555.

114. — Mont. —, 597 P.2d 689 (1979).

may be awarded in an action at law,¹¹⁵ is identical to a decree for specific performance in which the purchaser is required to pay the balance of the purchase price.¹¹⁶ In this regard, the court adopted the holding in *Renard v. Allen*,¹¹⁷ an Oregon case in which a prayer for a sale of the property was found consistent with the remedy of specific performance.¹¹⁸ Thus, if the vendor pleads and proves his ability and willingness to perform,¹¹⁹ a decree may be awarded requiring the purchaser to pay the balance of the purchase price, or requiring a sale of the property if the balance is not paid within the time set by the court.¹²⁰ The proceeds from the sale would be applied to the sum owed, plus damages and sale expenses.¹²¹

Neither *Glacier* nor *Renard* specifically addresses the question of whether the debt must first be accelerated in order for the vendor to request a decree of specific performance that involves a judicial sale.¹²² The question may seldom arise since acceleration, because of its utility, is usually included in the default clause, and the vendor usually elects to exercise it when a default goes uncured. To be safe, the vendor ought to exercise the power to accelerate if he wishes to request a decree that specifically mandates the sale of the property. But, if the power to accelerate is present in the clause and unexercised, it may be argued that a court of equity has the inherent power to grant such a decree in order to effect the intent of the parties.¹²³

In *Renard* the Oregon court also held that the statute prohibiting deficiency judgments in purchase money mortgages did not apply to installment land contracts.¹²⁴ Therefore, if the proceeds of the sale were found insufficient to satisfy the buyer's obligations, judgment could be granted making him personally liable for the balance owing.¹²⁵ Noting that the Oregon statute is identical to the Montana statute barring deficiency judgments in purchase money

115. See note 33 *supra*.

116. *Glacier*, ___ Mont. ___, 597 P.2d at 699.

117. 237 Or. 406, 391 P.2d 777 (1964).

118. *Glacier*, ___ Mont. ___, 597 P.2d at 698.

119. *Id.* at ___, 597 P.2d at 699.

120. See *id.* at ___, 597 P.2d at 697.

121. *Id.*

122. In *Glacier*, an acceleration provision was found to be present in the default clause, *id.* at ___, 597 P.2d at 694, and was found to be exercised, *id.* at ___, 597 P.2d at 695. In *Renard*, 237 Or. at 408, 391 P.2d at 778, an acceleration provision was found to be present but the opinion does not indicate that it was exercised.

123. See *Remedies for Breach*, *supra* note 33, at 555-56.

124. *Renard*, 237 Or. at 412, 391 P.2d at 780.

125. *Id.*

mortgages, the *Glacier* court adopted that holding as well.¹²⁶

One commentator, writing on *Renard*, has said, "The recent decision of the Oregon Supreme Court in *Renard v. Allen* may cause a suit for specific performance to become the most commonly sought vendor's remedy."¹²⁷ This comment may be equally applicable to *Glacier*. In effect, specific performance of this sort brings about a judicial foreclosure without the statutory prohibition against the deficiency judgment. In this way, the remedy is clearly superior to an action for forfeiture in most instances. From a vendor's standpoint, specific performance ensures that he will receive the benefit for which he originally contracted. An action for forfeiture, in contrast, may entail the same amount of time spent in litigation and, if successful, results in the vendor having to resell the property. As discussed earlier, an action for forfeiture may also be subject to equitable relief that mitigates its enforcement. Finally, from a standpoint of fairness, specific performance precludes the vendor from becoming unjustly enriched when the payments to be retained exceed the damages of the default. If a sale of the property results in a surplus of proceeds, the purchaser should expect to share in that surplus.¹²⁸

C. A Remedy for Defensible Equity

The claim that forfeiture is an effective remedy for all defaults, no matter when they occur during the life of the contract, has been seen to be without merit. For the most part, forfeiture is a paper tiger. It is fearsomely effective if the buyer lacks the knowledge that it may be resisted, the financial means to contest it or the equity that justifies defense. The value of forfeiture to the seller exists in its use as a self-help remedy by which the time, expense and risk of litigation are avoided.¹²⁹ Moreover, it has been seen that specific performance appears to be the more reliable action if the seller must resort to litigation.

126. *Glacier*, ___ Mont. ___, 597 P.2d at 697.

127. Spencer, *supra* note 35, at 182.

128. This conclusion would seem to follow from the logic of both *Renard* and *Glacier* in permitting the purchaser to be held personally liable if the proceeds fail to satisfy the claim. Hence, if there exists a surplus of proceeds, the purchaser should share in that as well.

One question arises that the courts did not address: Whether the purchaser from the court-ordered sale would acquire the land subject to statutory rights of redemption? MCA § 25-13-802 (1979) provides for a year-long right of redemption from the sale of property in execution of judgment. It is not clear whether this sort of decree of specific performance would entail those rights.

129. See *Vendor's Remedies*, *supra* note 2, at 205-06.

With the inherent flexibility of the installment land contract, the seller should not be left with only a choice between self-help and litigation in order to deal with default. By including a power of sale in the default clause, the seller may foreclose the buyer's interest without litigation, and he may increase the effectiveness of forfeiture as a self-help remedy. The following sections explore a restructuring of the vendor's remedies in order to include a power of sale.

1. *Defensible Equity*

At some point during the operation of an installment land contract, the buyer's investment in the property reaches an amount worth defending from forfeiture, even though he has given that power to the seller by the terms of the contract. In other words, once the buyer's investment becomes substantial, the seller should expect that the buyer in default may breach his agreement to comply with forfeiture. That expectation seems justified because, despite the changing interests of the parties in the property, forfeiture normally operates in the same manner throughout the life of the contract.¹³⁰ Thus, as the buyer's investment increases, the risk that forfeiture will fail as a self-help remedy increases. Furthermore, as that investment increases, the risk increases that a court of equity will refuse to enforce the forfeiture provision as it is written.¹³¹

For the purpose of illustration, the term "defensible equity" may be used to characterize the amount of investment, including appreciation of the land, that the buyer most likely will not allow to be forfeited without resisting. Determination of that amount may depend upon the particular terms of payment, the property involved and even the personality of the buyer. Hence, a precise determination of a defensible equity would be difficult to make but, as discussed below, the process of bargaining should be able to settle that determination to the satisfaction of the parties. The benefit of the notion of defensible equity is that it can indicate when forfeiture may become unreasonable, and therefore, progressively ineffective to deal with the buyer's default.

130. See text accompanying notes 56-58 *supra*.

131. There has been no attempt made to correlate levels of purchasers' equity with successful requests for relief under Montana's antiforfeiture statute simply because there are too few cases. As discussed earlier, relief is a matter of several considerations, see text accompanying note 90 *supra*, but it seems safe to say that substantial equity can indicate a history of prompt and full performance which a court of equity may take into consideration.

2. *Limitation of Forfeiture*

With the notion of defensible equity in mind, the vendor should be amenable to negotiating a limitation on forfeiture with the purchaser, and the two parties should be able to strike a balance between their respective risks in regard to forfeiture. From the vendor's standpoint, he should be willing to limit his right to use forfeiture in order to ensure its efficacy as a self-help remedy. The purchaser should be more than willing to bind himself to compliance with the vendor's exercise of a limited forfeiture power, since he is assured of not having to face the prospect of a substantial equity being subject to forfeiture.

In a practical sense, a determination of defensible equity can be achieved by bargaining over the use of forfeiture. The bargaining may concern the amount of the total contract price that must be paid before forfeiture becomes unavailable to the vendor. Total contract price means the purchase price, including down payment, as well as interest.¹³² Once that amount is agreed upon, it can be translated into the length of time forfeiture would be available to the vendor, or the percentage of the contract price that must be paid to extinguish the right of forfeiture. While bargaining may not result in a precise determination of defensible equity, it should result in a reasonable approximation that is satisfactory to the parties. Evidence of such a negotiation would appear to be dispositive if the agreement were challenged in court.¹³³

3. *Power of Sale*

Limitation of forfeiture serves to make forfeiture a more reasonable and effective remedy, but it does not solve the vendor's problem of being able to foreclose the purchaser's equity without litigation. By negotiating a limit on forfeiture, however, the vendor should be entitled to a power of sale that would be used primarily once his right to forfeiture was extinguished. This section will examine the operation of a power of sale and the legal propriety of

132. This suggested method would seem to make sense for the average buyer of a small piece of real property for which the contract may operate for 20 years. If the percentage to be discharged were to be computed on principal only, the limitation of forfeiture would not have any effect until very late in the term, and it would not reflect the buyer's true equity in the property because it would ignore appreciation.

133. Bargaining in most situations would not be complex or extended. It would proceed chiefly on a determination of what seemed reasonable to both parties in regard to the particular contract. For example, the vendor might offer a limitation at 25% of the contract price, and then agree to lower it to 20%. As long as the parties deal at arms length, it seems likely that a court would honor that agreement, should it have to be enforced in court.

employing it in an installment land contract.

A power of sale is a contractual agreement in which the buyer agrees to allow the seller, upon the buyer's default, to repossess the property, hold a public sale and use the proceeds to satisfy the buyer's obligation.¹³⁴ In Montana, the power of sale is used primarily in mortgages and trust indentures to avoid the time and expense of judicial foreclosure.¹³⁵ Traditionally, the power of sale has not been used in installment land contracts because of the vendor's confidence in forfeiture.¹³⁶ Since this confidence seems misplaced, particularly when substantial equity is at stake, a power of sale appears to be an appropriate substitute for forfeiture of defensible equity.

Because a power of sale is authorized by statute for use in mortgages and trust indentures, the question must be posed whether that statutory authorization precludes the use of a power of sale in an installment land contract. In response, it seems clear that the use of a power of sale provision in a contract default clause does not require statutory authorization since it is the product of private bargaining between the parties to the contract.¹³⁷ In this sense, a power of sale is a contractual right like forfeiture and acceleration. If public policy permits the use of forfeiture, it clearly should permit the use of a power of sale provision if the provision appears fair and reasonable.

A brief examination of the statutes pertaining to the power of sale as it is used in the mortgage and trust indenture reveals no legislative purpose to restrict its use to those devices. MCA § 71-1-111 (1979) provides for the use of a power of sale in a mortgage,¹³⁸ while MCA § 71-1-223 (1979) provides the choice, under a mortgage with a power of sale, either to foreclose the mortgagor's equity judicially or by the provisions of the mortgage.¹³⁹ If foreclosure is

134. *Vendor's Remedies*, *supra* note 2, at 209.

135. See generally text accompanying notes 11-28 *supra*; REAL ESTATE FINANCE *supra* note 14, at 476-77.

136. In California, forfeiture was relied on until the late 1940's, when judicially imposed protections for defaulting purchasers appeared. *Vendor's Remedies*, *supra* note 2, at 212 n.120.

137. *Vendor's Remedies*, *supra* note 2, at 212 (where an argument is made for the legal propriety of power of sale provisions in California installment land contracts).

138. MCA § 71-1-111 (1979) provides: "A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security."

139. MCA § 71-1-223 (1979) provides:

When a real estate mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this part to foreclose or proceedings may be had under the provisions of the mortgage.

to be effected by the provisions of the mortgage, certain requirements for notice, as provided by MCA § 71-1-224 (1979), must be met.¹⁴⁰ The Small Tract Financing Act of Montana, as discussed earlier,¹⁴¹ authorizes and regulates the use of a power of sale as it exists in a trust indenture.¹⁴² While the statement of policy of the act limits the use of trust indentures to tracts no larger than 15 acres,¹⁴³ there appears to be no intent to make the power of sale the exclusive tool of the trust indenture.¹⁴⁴

If an installment land contract employed a power of sale as the sole remedy for the purchaser's default, it might be argued that the contract was in substance a trust indenture, and at least voidable for failing to comply with the statutory requirements of that device. The installment land contract, however, has been held not to be a mortgage,¹⁴⁵ and therefore, there seems to be no reason to challenge the validity of an installment land contract that contains a power of sale as one of the possible remedies for the purchaser's default.

The power of sale fits neatly into the installment land contract. Because the vendor retains the legal title to the property for the life of the contract, a provision that would grant the vendor the power to dispose of the purchaser's equity would be sufficient. That provision would be placed in the body of the contract, and would state to the effect that, upon the purchaser's unremedied default, the vendor was authorized to declare a sale and to apply the proceeds to the debt owed plus expenses.¹⁴⁶

Since the power of sale would be employed chiefly in place of forfeiture, the vendor would gain little by drafting a provision that

140. Thirty days notice is required with advertising by newspaper and posting, and personal service must be had on persons claiming interests of record. MCA § 71-1-224 (1979).

141. See generally text accompanying notes 19-28 *supra*.

142. MCA § 71-1-305 (1979) provides that trust indentures are subject to all mortgage laws except as those laws are inconsistent with the Small Tract Financing Act of Montana.

143. MCA § 71-1-302 (1979) provides in part, "it is hereby declared to be the public policy of the state of Montana to permit the use of trust indentures for estates in real property of not more than 15 acres as hereinafter provided."

144. The particular nature of the trust indenture, as it operates in the Small Tract Financing Act, is that it involves a power of sale in a trustee who is precluded from being the beneficiary as well. MCA § 71-1-303(1) (1979). In contrast, under a standard mortgage with a power of sale, the mortgagee, who would benefit from the sale, may have the power of sale vested in him. MCA § 71-1-111 (1979). Thus, the power of sale as it operates in the Small Tract Financing Act is a variation of the power of sale as it exists generally.

145. *E.g.*, *Glacier*, — Mont. —, 597 P.2d at 698; *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 297-98, 133 P. 694, 696-97 (1913).

146. No attempt will be made here to discuss how that provision would specifically appear.

was simply a pretense for forfeiture. Hence, once forfeiture was extinguished in the contract, the purchaser would deserve an extended period of redemption, which would reflect his increased equity and his satisfactory performance up to that point. While the mortgage power of sale requires 30-days notice prior to sale¹⁴⁷ which coincides with the purchaser's equity of redemption, the trust indenture requires 120 days.¹⁴⁸ The difference in time presumably exists because the trust indenture does not provide a year-long statutory right of redemption for the purchaser after the sale.¹⁴⁹ The California statute which regulates the power of sale provides for a period of 111 days, from default to sale, in which the purchaser may redeem his interest.¹⁵⁰ Since the purchaser under the installment land contract would have no opportunity to redeem after the sale, his increased equity, once forfeiture has been extinguished, warrants a period for redemption comparable with the 120 days provided by the trust indenture.¹⁵¹ That period might include 30 days in which the purchaser could redeem the specific default, and 60-90 days in which to discharge the accelerated debt.

The use of affidavits to establish that the vendor has complied with the terms of the power of sale provision, in regard to notice and advertisement, would guard against a challenge on grounds of technical breach.¹⁵²

In sum, the use of a limited forfeiture provision coupled with a power of sale enhances the remedies of the seller, and provides a measure of increased protection for the buyer's interests. During the initial period of the contract term in which the risk of default is high,¹⁵³ the vendor would have the right to exercise forfeiture as well as to effect a sale. Through bargaining, the parties should be able to determine a period in which forfeiture operates reasonably and effectively. Subsequent to that period, the purchaser would be guaranteed that forfeiture was unavailable to the vendor. The purchaser would also be guaranteed an increase in time in which to redeem his interest, while the vendor would rely on a summary

147. MCA § 71-1-224 (1979).

148. MCA § 71-1-315(1)(a) (1979).

149. See MCA § 71-1-318(3) (1979) (the trustee's deed will convey title without a right of redemption).

150. *Vendor's Remedies*, *supra* note 2, at 211. See generally *id.* at 210-11 (discussion of the mechanics of the California power of sale statute, CAL. CIV. CODE § 2924 (West 1970)).

151. As a private contractual agreement, the power of sale would not be required to provide for any right of redemption after the sale.

152. The affidavits could also be deposited with the deed for recording.

153. See generally *Vendor's Remedies*, *supra* note 2, at 215 n.144 (survey of California real estate developers revealed that, in their experience, 90% of purchasers who default do so within the first year of the contract).

proceeding by which to foreclose that interest. The vendor would also have other remedies at law or equity with which to protect his interest.

D. *Election of Remedies*

Upon a purchaser's default, the vendor has a great deal of flexibility with which to respond to that default, if he has not bound himself to a specific course of action by the terms of the default clause. The fundamental choice that he faces after default is whether to disaffirm the contract through use of the remedy of forfeiture, or to affirm the contract by the use of some other remedy like specific performance.¹⁵⁴ This section briefly explores the law of election of remedies as it relates to installment land contracts.

1. *Election Prior to Default*

In the absence of a contractual provision expressly limiting the remedies available, a party may pursue any remedy available at law or equity.¹⁵⁵ As applied specifically to forfeiture, this rule provides that, unless the forfeiture provision expressly states that it is to be the only course of settlement upon default, the provision exists for the benefit of the vendor alone, and he may elect to resort to it or to sue on the contract.¹⁵⁶

As discussed earlier, acceleration may be used prior to forfeiture or prior to any other remedy.¹⁵⁷ An election to accelerate the debt by itself has not been held to waive the remedy of forfeiture.¹⁵⁸

2. *Election upon Default*

If a vendor pursues one of his remedies to a conclusion, he is precluded from attempting to pursue another.¹⁵⁹ Hence, it has been held that the vendor is not permitted to sue for installments

154. The doctrine of election of remedies governs the pursuit of inconsistent remedies; in regard to the installment land contract, inconsistency centers primarily on the use of forfeiture by which the contract is disaffirmed and the pursuit of some other remedy by which the contract is affirmed. 5 S. WILLISTON, *CONTRACTS* § 683 (3d ed. 1961).

155. *Glacier*, ___ Mont. ___, 597 P.2d at 696.

156. *Alexander v. Wingett*, 63 Mont. 254, 259, 206 P. 1088, 1089 (1922) (reaffirmed in *Glacier*, ___ Mont. ___, 597 P.2d at 696).

157. See text accompanying notes 100-01 *supra*.

158. Although it might be argued that acceleration of the debt was inconsistent with forfeiture, traditionally the two have been used together in Montana. *E.g.*, *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 294, 133 P. 694, 695 (1913); *Glacier*, ___ Mont. ___, 597 P.2d at 694.

159. *J. M. Hamilton Co. v. Battson*, 99 Mont. 583, 591, 44 P.2d 1064, 1067 (1935).

owing, once the purchaser in default has vacated the premises upon receipt of a notice of forfeiture.¹⁶⁰ It has also been held that a vendor's demand for payment of an installment, coming after the commencement of an action to cancel the contract, is not a waiver of that action since no remedy had been pursued to its conclusion.¹⁶¹

IV. A PROPOSED DEFAULT CLAUSE

To illustrate the suggestions made in the course of this discussion, a proposed default clause is included with a provision-by-provision analysis. For the sake of brevity, a provision detailing the manner in which the seller is to notify the buyer has been omitted.

A. *The Clause*

Time is of the essence. If the buyer fails to make full and prompt payment of the principal or the interest thereon, or fails to make the required payments for taxes, insurance and assessments before they become delinquent, or fails to perform any of the covenants or conditions on his part, the seller, at his option, may consider such a failure a "default" by providing written notice of such default to the buyer. The buyer shall have 30 days from the mailing of this default notice, or 30 days from the date of personal service on the buyer (or upon an officer, director or authorized agent of buyer) in which to cure the default. As used herein, "cure" means to make full payment of all payments due, or to perform all covenants or conditions to be performed by the date specified in the default notice. If so cured, this contract shall continue in full force and effect.

In the event that the buyer fails or neglects to cure the noticed default within the 30-day period, then the seller, at his option, may provide the buyer with a second written notice by which the total amount owing and unpaid on the principal, together with the seller's reasonable attorney fees incurred by the preparation of the default notices, is accelerated and therefore shall become immediately due and payable. The buyer shall have

160. *Adamczik v. McCauley*, 89 Mont. 27, 35, 297 P. 486, 488 (1931) (when purchaser vacated the premises upon receipt of a notice of forfeiture vendor was deemed to have pursued remedy of forfeiture to a conclusion). *But see* *Glacier*, — Mont. —, 597 P.2d at 700 (Sheehy, J., dissenting). Justice Sheehy maintained that the default clause was written in such a way as to mandate forfeiture once the demand for acceleration was not satisfied. In effect, he said forfeiture was elected by the terms of the clause and occurred ipso facto upon exercise of the power to accelerate and the failure to comply with that demand. *Id.* Support for that proposition is found in early cases. *E.g.*, *Edwards v. Muri*, 73 Mont. 339, 351, 237 P. 209, 213 (1925); *Light v. Zeiter*, 124 Mont. 67, 71, 219 P.2d 295, 297 (1950).

161. *White v. Jewitt*, 106 Mont. 416, 421, 78 P.2d 85, 88 (1935).

30 days, from the mailing of the second notice or upon being personally served with the notice, in which to pay the entire sum due under the contract. If so paid, the buyer's contract obligations shall be deemed discharged.

In the event that the buyer fails or neglects to pay the entire sum due within the time specified in the second default notice, then the seller, at his option, may provide the buyer with written notice that the seller thereby intends to:

1. Cancel and terminate this contract, upon which the buyer shall quit the premises peaceably, and the seller shall repossess the property and retain all payments made on account of the contract and all improvements made to the property as reasonable value for the use and enjoyment of the premises during the period in which they were occupied by the buyer; or
2. Exercise the power of sale as provided in this contract for the purpose of foreclosing the buyer's interest in the property; or
3. Pursue any and all remedies at law or equity to enforce performance of this contract, or to collect the balance due hereunder. Reasonable attorney fees incurred by such action shall be included.

In the event that the buyer has paid 20% of the contract price, which includes principal plus interest, the seller's right to cancel the contract upon the buyer's default shall be extinguished, and the buyer shall have an additional 30 days in which to pay the entire sum due, if the balance is accelerated as provided hereinabove.

B. Analysis

Time is of the essence. If the buyer fails to make full and prompt payment of the principal or the interest thereon, or fails to make the required payments for taxes, insurance and assessments before they become delinquent, or fails to perform any of the covenants or conditions on his part, the seller, at his option, may consider such a failure a "default" by providing written notice of such default to the buyer.

Time: The phrase, "time is of the essence," may be included in the default clause or elsewhere in the contract. It is included primarily to make the purchaser's performance on the date agreed upon an expressly enforceable term of the agreement, and it is said that a court of equity requires an express statement that timely performance is a duty in order not to interfere with or modify that

duty.¹⁶²

Default: In the installment land contract, default is synonymous with material breach. Therefore, to avoid questions of whether a breach is material or immaterial, all breaches may be defined as a default.¹⁶³

Notice: Notice provisions must be strictly followed in a default clause in order to guard against the defense that timeliness has been waived.¹⁶⁴ If the amount of a default is to be set forth in a notice, the figure must be accurate in order for the notice to have the desired effect.¹⁶⁵

The buyer shall have 30 days from the mailing of this default notice, or 30 days from the date of personal service on the buyer (or upon an officer, director or authorized agent of the buyer) in which to cure the default. As used herein, "cure" means to make full payment of all payments due, or to perform all covenants or conditions to be performed by the date specified in the default notice. If so cured, this contract shall continue in full force and effect.

Grace Period: The period in which the buyer is allowed to remedy his default varies from contract to contract, and is determined by a standard of reasonableness.¹⁶⁶

Notice: The manner in which the buyer may be notified may

162. 3 AMERICAN LAW OF PROPERTY § 11.45 (A. J. Casner ed. 1952). Case law under the ant forfeiture statute reveals clearly that the phrase has little effect within that particular context of equity. See text accompanying notes 90-96 *supra*. See also *Barkis v. Scott*, 34 Cal. 2d 116, 122-23, 208 P.2d 367, 371-72 (1949) (Justice Traynor construed California's ant forfeiture statute to allow relief even though time had been declared of the essence). But see *Ingalls v. Brady*, ___ Mont. ___, 591 P.2d 200, 204 (1979) (vendor denied rescission of sale/purchase agreement for real property because time was not made of the essence in the agreement).

163. *E.g.*, *Dobitz v. Oakland*, ___ Mont. ___, 561 P.2d 441, 442-43 (1977) (by the terms of the clause, a breach of the provision prohibiting assignment was a default as well as enforceable as such); *Smith v. Zepp*, 173 Mont. 358, 368, 567 P.2d 923, 929 (1970) (by the terms of the clause, a breach of production quota in an installment land contract for a mining claim was not held to be a default, therefore a declaration of forfeiture was denied).

164. See text accompanying notes 67-69 *supra*.

165. *E.g.*, *Shuey v. Hamilton*, 142 Mont. 83, 91, 381 P.2d 482, 486 (1963) (notice of default contained "unreasonable" error in the amount owed, and was held unenforceable). See also *Bennett v. Goltz*, 149 Mont. 445, 448, 428 P.2d 1, 3 (1967) (contested notice of acceleration, with forfeiture occurring automatically if accelerated debt not satisfied, held enforceable despite allegations of ambiguity); *Christensen v. Hunt*, 147 Mont. 484, 489-90, 414 P.2d 648, 651 (1966) (technical breach by which notice of forfeiture was sent to address different from that provided in contract was held not prejudicial to vendor since purchasers received it at the address to which it was sent).

166. Some contracts include a provision for shortening the grace period upon repeated defaults. Use of such a provision may be open to attack for working an unjust forfeiture, but the circumstances of the default will control. See generally text accompanying notes 60-63 *supra*.

be drafted in more detail, and relegated to a separate clause. The portion above in parentheses applies to a corporation or other business entity.

Cure: Care should be taken to define special terms. Here, cure is used as a synonym for remedy, and is defined to clarify what the buyer in default must do in order to keep the contract in effect.

In the event that the buyer fails or neglects to cure the noticed default within the 30-day period, then the seller, at his option, may provide the buyer with a second written notice by which the total amount owing and unpaid on the principal, together with the seller's reasonable attorney fees incurred by the preparation of the default notices, is accelerated and therefore shall become immediately due and payable. The buyer shall have 30 days, from the mailing of the second notice or upon being personally served with the notice, in which to pay the entire sum due under the contract. If so paid, the buyer's contract obligations shall be deemed discharged.

Acceleration: The provision above provides for the acceleration of the balance of the purchase price. An acceleration provision must be present in the default clause in order for the balance to be called due immediately once the default has gone uncured; the debt cannot be accelerated by notice alone.¹⁶⁷ The acceleration provision may be tied to the forfeiture provision, or it may be used as a prelude to the exercise of any remedy. Unless acceleration is kept clearly distinct from any other remedy, it may be construed that, once acceleration is effected and has gone unsatisfied, the seller has bound himself to the remedy that follows it in the clause.¹⁶⁸ Acceleration coupled with the remedy of specific performance may result in a judicial foreclosure without the prohibition against a deficiency judgment.¹⁶⁹

Grace Period: Thirty days are provided the buyer to satisfy the acceleration demand. Again, the number of days provided is measured by a standard of reasonableness. Enough time should be given to the buyer to refinance, without inconveniencing the seller who most likely has obligations to satisfy with the buyer's payment.

167. See generally text accompanying notes 100-12 *supra*.

168. See generally *Glacier*, — Mont. —, 597 P.2d 689. At issue was the construction of a default clause in which acceleration was ambiguously linked with forfeiture. The majority held that the clause did not provide that any remedy, particularly forfeiture, was the exclusive remedy for default, and that the seller's actions subsequent to default evidenced an intent to sue on the contract. *Id.* at —, 597 P.2d at 695. But see Justice Sheehy's dissent. *Id.* at —, 597 P.2d at 700.

169. See generally text accompanying notes 113-28 *supra*.

In the event that the buyer fails or neglects to pay the entire sum due within the time specified in the second default notice, then the seller, at his option, may provide the buyer with written notice that the seller thereby intends to: . . .

Option: Throughout the clause the seller is given the option of whether to exercise his remedial rights in order to retain adequate flexibility to deal with a default. This flexibility is most important in the exercise of major remedies like forfeiture or specific performance.¹⁷⁰

Notice: By having the seller give notice of what he intends to do to protect his interests, the buyer is assured of reasonable notice. This consideration applies particularly to the exercise of forfeiture.¹⁷¹

1. Cancel and terminate this contract, upon which the buyer shall quit the premises peaceably, and the seller shall repossess the property and retain all payments made on account of the contract and all improvements made to the property as reasonable value for the use and enjoyment of the premises, during the period in which they were occupied by the buyer; or . . .

Forfeiture: This is a standard forfeiture provision which gives the seller the power to disaffirm the contract and extinguish the buyer's rights and interests.¹⁷² No restitution of the buyer's payments is granted; no further opportunity to redeem is provided.

Reasonable value: The term "reasonable value for use and enjoyment" is employed in place of the commonly used "liquidated damages" or "reasonable rent" as a justification for the retention of payments and improvements. Although reasonable rental value has been used by the court to measure the seller's damages in cases under Montana's ant forfeiture statute,¹⁷³ the court in *Fontaine v. Lyng*¹⁷⁴ held that the relationship of landlord and tenant did not exist under the installment land contract at issue there.¹⁷⁵ Liquidated damages are void by statute in Montana.¹⁷⁶ The use of the California version of that statute to corroborate a policy attack on forfeiture has proved successful there,¹⁷⁷ but early Montana cases

170. See generally text accompanying notes 154-61 *supra*.

171. It may be argued that the purchaser has adequate notice up to this point, but notice would be required if the notice of acceleration did not specify the course of action to be taken upon failure of the purchaser to comply with acceleration.

172. See generally text accompanying notes 43-46 *supra*.

173. *Abolishing Contracts*, *supra* note 1, at 114 n.17.

174. 61 Mont. 590, 202 P. 1112 (1921).

175. *Id.* at 598, 202 P. at 1114-15.

176. MCA § 28-2-721 (1979).

177. See text accompanying notes 73-76 and 79-80 *supra*.

have held immaterial the question of whether a forfeiture provision may be void as an unenforceable liquidation of damages.¹⁷⁸ Given the basis of the forfeiture provision in the American Rule,¹⁷⁹ it may be unnecessary to fix any label on the forfeiture other than the neutral "reasonable value for use and enjoyment."

2. Exercise the power of sale as provided in this contract for the purpose of foreclosing the buyer's interest in the property; or . . .

Power of sale: A power of sale provision that gives the seller the right to sell the property to satisfy the buyer's obligation would be included in the body of the contract. That provision would include requirements for notice and advertisement of the sale, and might grant the buyer the right to discharge the accelerated debt up to the date of sale. The power of sale remedy is envisioned to operate chiefly when forfeiture is extinguished.¹⁸⁰ But there seems no reason to preclude its availability to the seller before that point.

3. Pursue any and all remedies at law or equity to enforce performance of this contract, or to collect the balance due hereunder. Reasonable attorney fees incurred by such action shall be included.

Other remedies: This provision expressly gives the seller the option to pursue any other remedies he finds necessary. The absence of any express limitation on remedies insures the same result.¹⁸¹ Specific performance and an action at law for the purchase price are included in the provision.¹⁸² The expression of the intent to recover the balance may aid a court of equity in effecting the intent of the parties.¹⁸³

In the event that the buyer has paid 20% of the contract price, which includes principal plus interest, the seller's right to cancel the contract upon the buyer's default shall be extinguished, and the buyer shall have an additional 30 days in which to pay the entire sum due, if the balance is accelerated as provided hereinabove.

Forfeiture: This provision provides for a limitation on forfeiture that should serve to make forfeiture a more effective self-help

178. *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 297, 133 P. 694, 696 (1913); *Fratt v. Daniels-Jones*, 47 Mont. 487, 496, 133 P. 700, 701-02 (1913) (both cases held that if such a provision were found to be void, the forfeiture provision would not be affected).

179. See generally text accompanying notes 47-52 *supra*.

180. See generally text accompanying notes 146-53 *supra*.

181. See text accompanying notes 155-56 *supra*.

182. See generally text accompanying notes 113-26 *supra*.

183. See generally text accompanying notes 122-23 *supra*.

remedy.¹⁸⁴ The limitation also serves to recognize the increasing level of the buyer's equity. The failure of the standard forfeiture provision to do so makes forfeiture a difficult remedy to attempt to enforce in a court of equity.¹⁸⁵ The percentage of the contract price at which forfeiture may be extinguished may be determined by bargaining.¹⁸⁶ The power of sale provision fulfills its chief function, when forfeiture is extinguished, by providing an extrajudicial proceeding for the termination of the buyer's interest.¹⁸⁷ In consideration of the buyer's increased equity, he is given more time in which to secure refinancing to discharge the accelerated debt.

V. CONCLUSION

A contractual limitation on the seller's right to exercise forfeiture is a recognition that the interests of the parties in the property are not static. The standard forfeiture provision fails to recognize this change in the parties' interests since it is drafted to operate in the same manner throughout the term of the contract. Because the parties fail to limit forfeiture, courts of equity are obliged to make adjustments to mitigate the effects of an unreasonable forfeiture.

A limitation on forfeiture, imposed voluntarily, will serve to give the protection that the buyer's equity deserves, as well as to ensure the effectiveness of forfeiture at the outset of the contract. A purchaser's attorney, confronted with a standard installment land contract, is in the best position to safeguard his client from facing the possibility that a substantial equity may be forfeited. Through negotiation, he may be able to arrive at a forfeiture period that reflects the amount of equity which does not justify defense.

By including a power of sale in the contract, the seller has at his disposal a remedy to use in place of forfeiture that is relatively inexpensive and expedient. Therefore, self-help, the major benefit of forfeiture, assumes another form for the seller's use, with the result that the contract operates with a fair set of remedies which reflects the interests of the parties.

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184. See generally text accompanying notes 130-33 *supra*.

185. See generally text accompanying notes 130-31 *supra*.

186. See generally text accompanying notes 132-33 *supra*.

187. See generally text accompanying notes 146-53 *supra*.